BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 99-1:,

SUMAS ENERGY 2 GENERATION FACILITY

SUMAS ENERGY 2'S OPPOSITION TO WHATCOM COUNTY'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

Whatcom County's Motion for Reconsideration consists of oblique and conclusory allegations that the Energy Facility Site Evaluation Council (EFSEC) lacks the authority to require an applicant to submit further information on issues of concern and to grant parties a full and fair opportunity to address those issues. The County suggests that EFSEC should ignore the policies, premises, and spirit of its originating statute and its regulations, and instead follow a duplicative and inflexible process for assessing applications. The Council should deny Whatcom County's motion. EFSEC's statute and regulations allow the Council broad procedural latitude to gather all information necessary to evaluate an application, to ensure appropriate public participation, and to pursue courses of action that balance the pressing need for increased energy facilities and the broad interests of the public. Council Order No. 757 is well within this authority and furthers EFSEC's purposes and policies.

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II. COUNCIL ORDER NO. 757 IS WELL WITHIN EFSEC'S AUTHORITY.

As argued in SE2's motion for reconsideration and recognized in Council Order No. 757, EFSEC had the broad authority to pursue courses of action well beyond the procedure proposed by the Council in Order No. 757. As it has in connection with previous applications, EFSEC could have imposed significant mitigation conditions and requirements in the Site Certification Agreement to address particular issues without allowing any further input or evidence from the parties. *See* Sumas Energy 2's Motion for Reconsideration at 30, and Council Order No. 757 at 9. In this case, however, the Council opted for a process that would allow further input from all parties. In denying SE2's motion for reconsideration, the Council granted the request of Whatcom County and other parties to have "an opportunity to know the claims [of SE2] and a meaningful opportunity to meet those claims." Whatcom County's Response to Motion for Reconsideration ("Whatcom County Response") at 10, lines 18-19. The middle ground crafted by EFSEC in Order No. 757 is well within the Council's authority.

The EFSEC statute and regulations do not address the current situation expressly. However, the statute grants EFSEC broad discretion to develop processes and conduct proceedings in such a way that they further the underlying purposes of the statute. *See* RCW 80.50.040(1), (3), (4), (7). The legislative policy underlying EFSEC's operations is "to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods" that energy facilities are appropriately sited. RCW 80.50.010. EFSEC is instructed "to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public." *Id.* EFSEC has broad authority to establish rules and procedures that will carry out these

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policies. There is simply nothing in the EFSEC statute or regulations that prohibits the Council from the course of action proposed in Council Order No. 757.

Whatcom County nonetheless claims that RCW 80.50.100(3) and WAC 463-42-690 prohibit SE2 from submitting a revised application for the Sumas site until the Governor issues a final decision on the previous application. The language of these provisions contains no support for the County's interpretation.

RCW 80.50.100(3) makes clear that an applicant may submit another application for a particular site even after the Governor has denied a previous application for the same site. It nowhere prohibits the filing of a revised application before a final determination by the Governor on a prior application. On the contrary, the fact that the statute specifically states that a subsequent application for the same site is "not preclude[d]" even after final rejection of an application by the Governor logically indicates that a subsequent application for the same site *before* final rejection of the application by the Governor is permitted and is assumed by the statute. It is unlikely that the legislature intended that EFSEC should send an application to the Governor and ask him to waste his time and the people's resources evaluating and rejecting an application when EFSEC was aware beforehand that changed circumstances and new information warranted a revised or subsequent application for the same site and that such an application would be forthcoming. Such a process would waste public resources and entail delay that would undermine the very purpose of the facility siting statute.

WAC 463-42-690 is similarly inapposite. Through this regulation, the Council seeks to prevent the consideration of amendments that other parties to adjudicatory proceedings have not had an opportunity to consider and address in accordance with the requirements of due process. The process proposed in Order No. 757 is entirely consistent with this

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mandate. Council Order No. 757 honors the purpose of EFSEC's amendment provisions to "avoid surprise to the other parties to the adjudication and to allow both the parties and the public to have an opportunity to adequately prepare and present their positions," as well as adhering to the spirit of EFSEC's guiding statutes and regulations that "the Council's recommendation should be based on the best information available to the Council concerning the project" and that "encourage[s] the development of new proposals on the basis of changed conditions or new information." See Council Order No. 757 at 10, 11 (quotations omitted). Council Order No. 757 is within EFSEC's authority and, as discussed below, is in the public interest.

Whatcom County also reprints its previous argument, included in its opposition to SE2's motion for reconsideration, that EFSEC should not "reopen" its proceedings. The County concedes that EFSEC has the authority to do so,[1] but claims it should only do so in "extraordinary circumstances." Whatcom County Mo. for Recon. at 3. Ironically, the County cites *Cities of Campbell v. F.E.R.C.*, 770 F.2d 1180, 1191 (D.C. Cir. 1985), for this proposition, a case in which the court emphasized and upheld the agency's discretion in deciding whether to reopen its proceedings. Here, the Council has exercised its discretion to establish a procedure that furthers the public interest in satisfying the pressing need for energy facilities, while allowing all parties to be heard.[2]

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[1] The Facility Siting statute grants EFSEC considerable flexibility to reopen its proceedings. *See* RCW 80.50.090(3)-(4) (requiring the council to hold "a public hearing conducted as an adjudicative hearing" and authorizing additional such hearings "as deemed appropriate by the council"); RCW 80.50.100(2) (authorizing the reopening of the adjudicative proceedings).

[2] Even if a showing of "extraordinary circumstances" were required, the current situation is extraordinary: The entire Pacific Northwest is facing a severe energy crisis that is causing the closure of Washington businesses, loss of jobs, and dramatically increased energy bills. This crisis

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III. WHATCOM COUNTY'S MOTION IS CONTRARY TO PUBLIC INTERESTS.

Whatcom County is perfectly correct in one aspect of its motion – that it asks the Council to exult form over substance. Although it hinges this argument on the notion that procedural constraints are necessary "to offer protection and due process to the parties involved," nowhere does Whatcom County suggest that the process set forth in Council Order No. 757 does not protect Constitutional guarantees of due process and fundamental fairness. Whatcom County Mo. for Recon. at 2. Whatcom County's response to SE2's motion for reconsideration in fact laid out these requirements: "A fair administrative hearing includes an opportunity know [sic] the claims of the other party and a meaningful opportunity to meet those claims." Whatcom County Response at 10 (citing *In re Cuddy v. Dep't of Public Assistance*, 74 Wn.2d 19, 442 P.2d 617 (1968)). The process proposed in Council Order No. 757, including additional evidentiary hearings, will inarguably provide those opportunities.

Whatcom County also exults form over substantive public interests. Based on shear rhetoric about not rewarding what Whatcom County misperceives as "tactical decisions" by SE2[3] and an unexplained need to support the doctrine of finality of judicial decisions

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has prompted the Governor to declare an energy alert and suspend environmental requirements in order to bring new electric generation on line. Determining where and how additional power can be generated is a matter of public urgency. The applicant has proposed and agreed to comply with unprecedented mitigation and environmental measures that will influence the standards for all future energy generation plants in the state. Certain changes in the proposed project arose as a result of the exigent power shortage circumstance, and circumstances permitted the Council to develop a process that ensures the parties fair and due opportunity to be heard on new issues arising from those changes. More "extraordinary circumstances" surrounding siting a new energy generation facility are difficult to imagine.

[3] Whatcom County's suggestion that the conditions proposed in SE2's motion for reconsideration were the result of "tactical decisions" not to offer them earlier is patently absurd.

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through EFSEC, Whatcom County argues that sending the Council's recommendation to the Governor, requiring the Governor and his staff to spend significant time and resources on a determination, and only then, after significant delay, if the Governor rejects the application, allowing SE2 to file a revised application reflecting the changed circumstances and conditions that the Council has already deemed warrant consideration on their merits, is better than permitting a prompt determination of the merits of the SE2 project now. This position pays no regard whatsoever to the public's interests. The goals of "finality" and punishing alleged tactical choices do not serve the pubic interest when the public interest is the urgent need for an abundance of clean, reliable power.

SE2 offers a project that surpasses regulatory requirements, provides unprecedented mitigation, and is desperately needed in the region. Public interests dictate that permitting the project, or, at least, determination whether to permit the project, should proceed as expeditiously as possible. The unnecessary and inevitably lengthy delay promoted by Whatcom County and Ms. Hoag would serve no public interest. The SE2 project is needed now. If it will not be permitted despite the conditions SE2 has proposed, then that needs to be known as soon as possible so that other plans and projects to meet the critical energy deficit can be developed.

SE2's application to EFSEC proposed the best project ever presented to the Council - not a single party has ever disputed this point. In addition to setting new standards and offering unprecedented voluntary mitigation measures, SE2 resolved important issues with the responsible agencies, including pipeline safety, wetlands, and fish and wildlife, prior to the adjudication. SE2 bent over backwards to make this a good project and to resolve issues and concerns as they arose. There was no holding back, there was no gambling on what EFSEC might do - SE2 proposed an outstanding project with every expectation that it would be approved.

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IV. THE PURPOSE OF WHATCOM COUNTY'S MOTION IS TO KILL THE PROJECT BY DELAY.

Whatcom County's motion leaps around searching for an argument to sustain its opposition to the fair and efficient process proposed in Council Order No. 757. The sole consistency to its arguments that the Council should send its prior recommendation to the Governor before consideration of additional conditions proposed by SE2 is *delay*. Unbelievably, at a time in which less efficient and greater emitting diesel and gas generators are being installed all over Whatcom County and the rest of the State to meet the public's urgent demand for additional electricity, Whatcom County is trying to further delay consideration of a much more environmentally friendly facility.

If EFSEC did forward Council Order No. 754 to the Governor now, as Whatcom County advocates, the Governor could take one of three actions. First, the Governor could approve the project – despite EFSEC's order and despite EFSEC's view that, while the SE2 project as then proposed should not be approved, a project incorporating the additional conditions proposed in SE2's motion is significantly better. In this case, delay is not a factor, but the conditions set forth in SE2's motion would not be considered or incorporated into the project. Second, the Governor could reject the project. In that case, SE2 and the parties would be back in the same position they are today. SE2 could file a revised application incorporating the conditions proposed in its motion for reconsideration and the Council could grant an abridged process to expeditiously consider that application – just as it has done here. The only difference is that running the course through the Governor would cause the project to be 60 days or more further delayed. Third, the Governor could remand the matter back to EFSEC to reconsider the project with the conditions proposed in SE2's

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motion for reconsideration – again putting the parties in the same position they are now but after a further two month or more delay.

What is clear is that Whatcom County is no longer interested in examining or resolving any of the issues regarding the SE2 project. Regardless of public needs and broad public interests, and for whatever reasons, Whatcom County and Ms. Hoag simply want to kill this project. This Council, however, has a duty and obligation to consider and act in the broad public interests. Recognizing the public interests at stake, the Council has proposed a process that will allow the prompt, fair, and efficient consideration of a revised SE2 proposal on its merits. Council Order No. 757 is well within the Council's broad procedural discretion and authority and furthers current urgent public interests. The Order should be sustained.

V. CONCLUSION

EFSEC was created to provide an efficient process "to balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the pubic." RCW 80.50.010. Council Order No. 757 proposes such a process – in particular, it provides a fair process that would move the project towards permitting in time to allow it to contribute capacity to help resolve the region's energy deficiency. Time is of the essence. Opponents should not be permitted to needlessly block prompt determination of whether, in the balance of energy needs and environmental protection, the SE2 project will or will not be part of the solution to the energy crisis in the region.

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Whatcom County's Motion for Reconsideration and Ms. Hoag's joinder should be denied.

DATED: May 9, 2001.

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